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view.¹⁸ But there are fatal objections. (1) The construction, obviously, is only proper where the statute provides that the corporate books shall be open to inspection.¹⁹ (2) The provision was constantly enacted before stock was made attachable.²⁰ (3) It is opposed to the general policy of our courts to enhance the safety and ease of transfers of stock.²¹ There is a line of cases which hold that, where property is sold but left in the possession of the vendor, a creditor may attach it, since the continued possession by the vendor is a badge of fraud and evidence of a secret trust. Following these cases it has been held that an attaching creditor acquires good title to stock standing in the name of the debtor, since the retention of some of the indicia of ownership is a badge of fraud.²² This view is objectionable, not only on some of the grounds stated above, but also because to-day a man's name on the books of the corporation is not such an indication of ownership as would mislead any one. Except where actual fraud is shown, the rights of a purchaser of a certificate ought to be protected against the claims of a subsequent attaching creditor of the transferor. The principal case illustrates the better view of a much vexed question.

THE PRESUMPTION OF LIFE.—*Continuity* is frequently said to be a subject of presumption. By this it is meant that, when a relation or condition of things, for example, is proved to have existed at a certain time, its continuance is presumed until the contrary is shown.¹ This principle has been applied, in terminology at least, to agency,² domicile, residence or non-residence,³ seisin,⁴ infancy,⁵ sanity or insanity,⁶ coverture,⁷ partnership,⁸ solvency or insolvency,⁹ possession and ownership of property.¹⁰ So also it was laid down in an early English case,¹¹ later followed by high authority,¹² that a person once shown to be living is presumed to be alive (for any reasonable period)¹³ until his death is proved.

¹⁸30 Am. Law Rev. 223.

¹⁹Broadway Bank v. McElrath (N. J. 1860) 2 Beas. 24.

²⁰Allen v. Stewart (1895) 7 Del. Ch. 287.

²¹Bank v. Lanier (1870) 11 Wall. 369.

²²Pinkerton v. The R. R. (1861) 42 N. H. 424; cf. Shipman v. Aetna Ins. Co. (1860) 29 Conn. 245.

¹Best, Ev. (8th Ed.) 686, *et seq.*; 1 Greenl., Ev. § 41, 42; 28 Alb. L. J. 284, 326; 29 Id. 347.

²Smout v. Ilbery (1842) 10 M. & W. 1; McKenzie v. Stevens (1851) 19 Ala. 691; Ryan v. Sams (1848) 12 Q. B. 460.

³Prather v. Palmer (1841) 4 Ark. 456; Inhabitants v. Inhabitants (1863) 6 Allen 508; Bell v. Kennedy (1868) L. R. 1 S. & D. App. 307.

⁴Wrotesley v. Adams (1557) Plowd. 187, 193; Smith v. Stapleton (1568) Plowd. 426, 431; Brown v. King (1842) 5 Metc. 173.

⁵Irvine v. Irvine (1860) 5 Minn. 61; *Re Lilleshall* (1845) 7 Q. B. 158.

⁶Menkins v. Lightner (1857) 18 Ill. 282; State v. Johnson (1873) 40 Conn. 136.

⁷Erskine v. Davis (1861) 25 Ill. 228.

⁸Cooper v. Dedrik (1856) 22 Barb. 516; Park v. Alexander (1844) 8 Scott N. S. 147, 161.

⁹Walrod v. Ball (1850) 9 Barb. 271; Mullen v. Pryor (1848) 12 Mo. 307.

¹⁰Magee v. Scott (1851) 9 Cush. 148; Lepout v. Todd (1866) 32 N. J. L. 124; Currier v. Gale (1856) 9 Allen 522.

¹¹Throgmorton v. Walton (1624) 2 Rolle Rep. 461.

¹²Wilson v. Hodges (1802) 2 East 312.

¹³Thomas v. Thomas (1864) 2 Dr. & Sm. 298; cf. Dixon v. Dixon (1792) 3 Bro. C. C. 510.

A consideration of the nature of the "presumption" employed in these cases demands a definition of terms. The "conclusive presumption"—a rule of substantive law, clearly has no application. "Presumption of fact" is used to denote an inference which is required by reason, but has no necessary legal effect. The genuine and only presumption means that to certain facts the law attaches a legal consequence: their proved existence presumes the existence of another fact, *i. e.*, establishes a *prima facie* case for the party upon whom the burden of proving this latter fact rests. This rule of law compels the jury to find the presumed fact in the absence of evidence to the contrary.¹⁴

Under this test it is clear that no presumption of life exists in England. Such a presumption was often announced *obiter*,¹⁵ and sometimes applied,¹⁶ but when it was urged before the King's Bench in *Doe v. Nepean*¹⁷ that consistency with the presumption of death after seven years required an assumption of life during that period, the doctrine of a presumption of life was repudiated. It was decided that the presumption of death concerned only the *fact*, and not the *time* of death. Equity, however, continued to enforce a presumption of life.¹⁸ But the cases so holding were later overruled, and a plaintiff, claiming under a legatee last heard from six months before the death of his testator, failed because no presumption of life could be substituted for proof.¹⁹

That several of the United States²⁰ enforce a presumption of life seems in large measure to be due to a decision²¹ of Chief Justice Gibson who found "palpable error" in the reasoning of *Doe v. Nepean*²² and preferred the rule of the English equity cases. There are too few adjudications involving the precise point, however, to warrant the assertion²³ that the result of his decision embodies the American doctrine. The principle has been applied in a recent case, and the date of the absent person's

¹⁴Thayer, Prelim. Treat. Ev. 313; 4 Wigmore, Ev. §§ 2491 *et seq.*; O'Gara v. Eisenlohr (1868) 38 N. Y. 296; cf. 8 COLUMBIA LAW REVIEW 127.

¹⁵Hopewell v. De Pinna (1800) 2 Camp. 113; George v. Jesson (1805) 6 East 80; Rex v. Twynning (1819) 2 B. & Ald. 386; Lloyd v. Deakin (1821) 4 B. & Ald. 433; see Chitty, Pleading, 30, n. (a).

¹⁶Throgmorton v. Walton, *supra*; Wilson v. Hodges, *supra*.

¹⁷5 B. & A. 86; 2 M. & W. 894, (1833); Rhodes v. Rhodes (1887) L. R. 36 Ch. Div. 586. In Scotland, following the civil law, there existed a presumption of life for one hundred years from the date of the absent person's birth, when the presumption gave way to that of death. Fife v. Fife (1855) 17 D. 951; 4 Scot. L. R. 169. By the Presumption of Life Limitation (Scotland) Act of 1881, 44 and 45 Vict. c. 47 § 8, it was provided that such person "shall be presumed to have died on the day which will complete a period of seven years from the time of his being last heard of." 35 Jour. Juris. 634.

¹⁸Lambe v. Orton (1859) 6 Jur. N. S. 61; Dunn v. Snowden (1862) 2 Dr. & Sm. 201; Thomas v. Thomas, *supra*; In re Benham's Trusts (1867) L. R. 4 Eq. 416; 419.

¹⁹In re Phené's Trusts (1869) L. R. 5 Ch. App. 137; In re Lewes' Trusts (1870) L. R. 11 Eq. 236. This principle, that the party claiming a right has the *onus* of establishing it, has always governed the survivorship cases in England. In re Green's Settlement (1865) L. R. 1 Eq. 288.

²⁰Bradley v. Bradley (1838) 4 Whart. (Pa.) 173; Reedy v. Millizen (1895) 155 Ill. 638; Eagle v. Emmet (N. Y.) *infra*; Smith v. Knowlton (1840) 11 N. H. 191; Crawford v. Elliott (1866) 1 Houst. (Del.) 465; Executors v. Canfield (1862) 15 N. J. Eq. 110; cf. People v. Ryder (N. Y.) *infra*; contra, Davie v. Briggs (1878) 97 U. S. 628; Hyde Park v. Canton (1879) 130 Mass. 505; Spencer v. Roper (1852) 13 Ired. 333; Whiteley v. Equitable Life (1888) 72 Wis. 170; Corley v. Holloway (1884) 22 S. C. 380 (*semble*).

²¹Burr v. Sim (1838) 4 Whart. (Pa.) 150; the same view was strongly urged by Mr. Justice Field in *Montgomery v. Bevan* (1871) 1 Sawyer 660; *accord*, Gilleland v. Martin (1844) 3 McLean 490; Moffit v. Varden (1840) 5 Cranch C. C. 658.

²²Whiting v. Nichol (1867) 46 Ill. 238.

death was fixed, it would seem erroneously, as at the end of a *second* period of seven years. *Freeman's Estate* (Pa.) Leg. Int., March 19, 1909.

In New York, though a court of last resort has not expressly passed upon the question, the decisions indicate that a presumption of life would be sustained.²² In a case exactly in point it was held that the law will not find, as a matter of fact, that the absent person died on the last day of the seven year period, but for the purposes of distributing personalty,²⁴ rights depending upon his life or death are to be administered as if such were the fact.²⁵ Moreover the presumption of death will not be permitted to operate if communication from the absent person would be improbable,²⁶ or no suitable effort has been made to locate him,²⁷ though the absence has lasted for an average lifetime.²⁸ Circumstances may be shown, however, which will set the matter at large, that is, where the proved facts warrant it, death may be inferred within seven years.²⁹ Thus where a ship, after putting to sea, has remained unheard from until all reasonable possibilities of her safety have passed, the conclusion may be reached that a passenger perished within the longest usual duration of the voyage.³⁰ So the circumstances of age and disease will support a finding of death within three months,³¹ while a suicidal intent,³² or the presence of a specific peril,³³ may warrant the inference that death took place about the time of disappearance. The facts which will support the presumption of life, as delimited in the New York decisions, therefore, are an absence wholly unexplained and unattended by circumstances which would lead to a reasonable inference of death within seven years.

The presumption must rest, it would seem, upon this narrowed basis of fact. To presume life unless a "specific peril"³⁴ is shown tends to disregard the probable truth of the matter not less than to insist upon "distinct evidence"³⁴ of life where no presumption is enforced. But to confine

²²*Eagle v. Emmet* (N. Y. 1856) 4 Bradf. (Sur.) 117; *In re Davenport* (1902) 75 N. Y. Supp. 934; *Matter of Sullivan* (N. Y. 1889) 51 Hun. 378; *O'Gara v. Eisenlohr* (1868) 38 N. Y. 296; *Stouvenal v. Stephens* (N. Y. 1868) 2 Daly, 319; *Dunn v. Travis* (N. Y. 1900) 56 App. Div. 317; *Nelson v. Masonic Life Assn.* (N. Y. 1901) 57 App. Div. 214; *Vought v. Williams* (1890) 120 N. Y. 253; *Matter of Board of Education of New York* (1903) 173 N. Y. 321; *People v. Ryder* (1891) 124 N. Y. 500; *Duke of Cumberland v. Graves* (N. Y. 1850) 9 Barb. 595; *McCarter v. Camel* (N. Y. 1846) 1 Barb. Ch. 455; *Young v. Shulenberg* (1901) 165 N. Y. 385; *Seligman v. Sonneborn* (N. Y. 1885) 1 How. Fr. N. S. 465.

²⁴The statute of 19 Car. II, c. 6, s. 2, (1667) respecting the lives in persons in leases, who were to be deemed naturally dead after an unexplained absence of seven years, was reenacted in 1 R. S. 749, and again in Code Civ. Pro. § 841. This provision applies only to estates *per autre vie*. *Matter of Bd. of Education, supra*. The section also provides for a presumption of death as of the time of the sale in partition proceedings, where unknown heirs have failed to appear for twenty-five years. The result in New York, therefore, is that with the exception of these two cases there is no presumption of death as affecting rights in real property. *Matter of Bd. of Education, supra*; *Vought v. Williams, supra*.

²⁵*Eagle v. Emmet, supra*.

²⁶*Matter of Miller* (N. Y. 1890) 30 St. Rep. 212, 49 Id. 644, aff'd. 147 N. Y. 713; *Hornberger v. Miller* (N. Y. 1898) 28 App. Div. 199, aff'd 163 N. Y. 578.

²⁷*McCarter v. Camel, supra*; *Dunn v. Travis, supra*.

²⁸*Dworsky v. Arndstein* (N. Y. 1898) 29 App. Div. 274; *Dunn v. Travis, supra*; *Vought v. Williams, supra*.

²⁹*Seligman v. Sonneborn, supra*.

³⁰*Oppenheim v. Wolf* (N. Y. 1846) 3 Sandf. Ch. 571; *Merritt v. Thompson* (N. Y. 1858) 1 Hilt. 551.

³¹*Matter of Ackerman* (N. Y. 1877) 2 Redf. 521.

³²*Sheldon v. Ferris* (N. Y. 1865) 45 Barb. 124; *Matter of Ketcham* (1889) 5 N. Y. Supp. 566.

³³*Matter of Morgan* (N. Y. 1900) 30 Misc. 578.

³⁴*In re Lewes' Trusts, supra*.

the operation of the presumption to limited facts is obviously to make it accord with the inferential value of those facts. In making the presumption reasonable it is made unnecessary.

MEASURE OF DAMAGES FOR FAILURE OF VENDOR OF REALTY TO GIVE TITLE.—The measure of damages for breach of a contract for the sale of personalty is everywhere the difference between the contract price and the market value on the date of performance. The exceptional rule in contracts to sell realty or to give a lease, restricting recovery under certain circumstances to the consideration money paid with interest, is based upon two lines of reasoning. In England, the exception as laid down in *Flureau v. Thornhill*¹ was established because of the highly complicated development of the law of real property, the consequent practical impossibility for a layman to know the state of his title without expensive prior investigation, and the hesitancy with which vendors would put land upon the market if compelled to respond in substantial damages.² The parties were taken to have acted with these circumstances in mind, and the contracts were considered to have been made upon the implied condition of title in the vendor.³ The extent of the exception was there for a long time the subject of dispute. Originally applied in *Flureau v. Thornhill* to a case in which a vendor found after making the contract a flaw in his title, its application was later denied where the vendor had no legal title at all, but only a contractual right to a conveyance.⁴ A later case refused to give only nominal damages because the vendor was guilty of bad faith,⁵ *Flureau v. Thornhill* having specified fraud as a ground for substantial damages. And where the vendor *bona fide* believed he had a legal title, though in fact he had only an equitable one,⁶ and where a landlord mistaking the legal effect of an ejectment suit thought he could give possession,⁷ substantial damages were refused. It was therefore, a disputed question whether the application of *Flureau v. Thornhill* depended upon the vendor's believed ownership of the property at the time the contract was made or upon his *bona fide* expectation of having the property by the time of performance.⁸ The former view was criticized as the result of Lord Tenterden's now exploded theory that a contract to sell property to which the vendor had only a contractual right was illegal, and it was properly doubted whether even bad faith could be the basis of substantial damages where the contract was conditioned upon the making of good title.⁹ The hostility of the courts to the limitation of the rule of *Flureau v. Thornhill* culminated in *Bain v. Fothergill*,¹⁰ in which the

¹(1776) 2 Wm. Bl. 1078.

²*Sikes v. Wild* (1861) 1 B. & S., 587.

³*Flureau v. Thornhill*, *supra*; *Walker v. Moore* (1829) 10 B. & C. 416; *Worthington v. Warrington* (1849) 8 C. B. 133.

⁴*Hopkins v. Grazebrook* (1826) 6 B. & C. 31.

⁵*Robinson v. Harmon* (1848) 1 Ex. 849.

⁶*Pounsett v. Fuller* (1856) 17 C. B. 658.

⁷*Buckley v. Dawson* (1854) 4 Irish C. L. R. 211.

⁸See *Pounsett v. Fuller*, *supra*; *Engel v. Fitch* (1868) 9 B. & S. 85; *Sikes v. Wild*, *supra*.

⁹See *Sikes v. Wild*, *supra*.

¹⁰(1873) L. R. 7 E. & I. App. 158.